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IN THE

Supreme Court of the United States

October Term, 1968

No. 1007

KATHLEEN MOGLIA,

Petitioner,

v.

JAMES GEOGHEGAN, PHILIP STACK, BENEDICT CIAVOLELLA, JOHN CODY, FRANK M. CAMPBELL, CHARLES J. MURPHY, FRANK L. KELLY, EDWIN E. REGNELL, JR., DUDLEY A. SAUNDERS, JOSEPH J. RYAN, WALTER SCHOFFMAN, ABRAHAM SCHWEBEL, CHARLES R. HERSEY and A. LAWRENCE GEROSA, as Trustees of Local 282—PENSION TRUST FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1968

No. .....

Kathleen Moglia,

Petitioner,

v.

James Geoghegan, Philip Stack, Benedict Ciavolella, John Cody, Frank M. Campbell, Charles J. Murphy, Frank L. Kelly, Edwin E. Regnell, Jr., Dudley A. Saunders, Joseph J. Ryan, Walter Schoffman, Abraham Schwebel, Charles R. Hersey and A. Lawrence Gerosa, as Trustees of Local 282—Pension Trust Fund,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court dated November 6, 1968 (reprinted in Appendix A hereto), affirming judgment dismissing petitioner's complaint entered in the United States District Court for the Southern District of New York.

Opinions Below

The District Court opinion is reported at 267 F. Supp. 641. It is separately presented in Appendix B hereto. The opinion of the Court of Appeals, printed in Appendix C hereto, is reported at 403 F.2d 110.

Jurisdiction

The judgment of the Court of Appeals was entered on November 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the Trustees of a union pension fund established and maintained pursuant to the Taft-Hartley Act (Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186) are barred from making pension payments to the intended beneficiary of a pension trust fund created from employer contributions made within the exceptions permitted under Section 302(c) (5) of the Act, 29 U.S.C. § 186(c)(5), solely because of the absence of an executed written agreement between the employer and the union specifying the detailed basis upon which payments into the fund were to be made by the employer.

2. Whether, having accepted the employer's monthly contributions into the fund for a period of twelve years, having regularly audited the employer's books in order to assure that payments into the fund were being made in the proper amounts, and having regularly mailed letters and literature of the fund to the employee, for whose benefit the contributions were made by the employer and accepted by them, the Trustees are not estopped from denying pension benefits to the intended beneficiary solely on the ground that there was no executed written agreement with the employer.

3. Whether the employer's conduct and action in observing the terms of the collective bargaining agreement attached to the trust agreement by paying uniform union scale wages and by making the required contributions to the trust fund were not tantamount to ratification and adoption of a written agreement by the employer even though it had not executed it.

Statute Involved

The statute involved is Section 302 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186. Section 302(a) and (b) provide as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> * * *
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Section 302 (c)(5) reads:

> (c) The provisions of this section shall not be applicable. . . . (5) with respect to money or other other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and

dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employer and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such otherplaces as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . . .

Section 302(d) provides:

(d) Any person who willfully violates any of the provisions of the section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Section 302(e) states:

> (e) The district courts of the United States and the United States Court of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of Section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of Section 17 of Title 15 and Section 52 of this title, and the provisions of sections 101-115 of this title.

Statement of the Case

Petitioner instituted suit seeking a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring her to be entitled to receive payments under the Pension Plan of Local 282-Pension Trust Fund and to other incidental relief. Jurisdiction in the district court was founded on the existence of a question arising under the Labor-Management Relations Act, § 302, 29 U.S.C. § 186, making the action one of which the district court had original jurisdiction pursuant to 28 U.S.C. § 1337.

Upon joinder of issue, petitioner moved for summary judgment and respondents cross-moved for similar relief on their counterclaim, on the ground that petitioner was not entitled to the relief she sought. The district judge (Ryan, J.) denied both motions with leave to reargue before him upon unqualified concession by petitioner that, although the complaint pleads to the contrary, there was no collective bargaining agreement between the employer of petitioner's husband and his union.

Petitioner therafter moved for reargument upon an affidavit containing a stipulation as to the absence of a collective bargaining agreement. Thereupon the district judge denied petitioner's motion and granted respondents' and dismissed the complaint.

Petitioner then appealed. The Court of Appeals affirmed the result reached in the District Court.

The Court ruled that, in the absence of an executed written agreement as required by subsection 302(c)(5)(B) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5)(B), petitioner was not a person who could, under Section 302, lawfully be paid pension benefit payments from the Trust Fund (App. C, pp. 25a-29a), and that, for the same reason, the Court was without power to invoke the theory of equitable estoppel as a basis for allowing payment of pension benefits from the Fund (App. C, pp. 29a-30a). It also ruled that the employer's conduct and action in observing the terms of the collective bargaining agreement attached to the trust agreement by paying uniform union scale wages and by making contributions to the trust fund did not constitute ratification, or any adoption, of the collective bargaining agreement by the employer (App. C, pp. 30a-32a).

All facts material for a determination herein are undisputed:

Petitioner is the widow of John J. Moglia (Moglia) who died on August 7, 1966.

For many years prior to his death, and at all times relevant hereto, Moglia had been a member in good standing of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 282 (Local 282), a labor organization representing employees of employers engaged in industries affecting commerce within the meaning of Section 302(a)(2) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186 (a)(2).

From 1937 until April, 1965, Moglia was employed by Elmhurst Contracting Company, Inc., or its successor (Elmhurst), both of which were employers within the meaning of Section 302(a) of the Act.

Respondents are the Trustees (Trustees) of the Local 282-Pension Trust Fund (Fund) which was established in 1955 by Local 282 and various employers who had entered into collective bargaining agreements with the Local and was a trust fund within the meaning of Section 302(c)(5) of the Act. The Fund was the successor of other trust funds in which the Local had theretofore participated and was created by execution of an agreement and declaration of trust (Trust Agreement).

Since 1959, a collective bargaining agreement typical of the ones in effect between Local 282 and various employers has been printed together and physically attached to the front of the Trust Agreement. Section 12 of the collective bargaining agreement gives the detailed basis upon which the employers are required to contribute to the Fund—that is, the dollars and cents for each employee for each hour, the limit on the payments and the time when payments are due (App. B, p. 10a).

From July 1, 1953, through March 31, 1965, Elmhurst made payments to the Fund on behalf of Moglia, and such payments were received and accepted by the Fund. Elmhurst never signed a collective bargaining agreement with Local 282 but it made the payments apparently in the amounts required under the applicable collective bargaining agreement as though it had executed such agreement.

During the period that Elmhurst made, and the Fund accepted, such payments, the books of Elmhurst were regularly audited by auditors for the Fund to assure that such payments were in the proper amounts.

Moglia was on the Fund's mailing list containing the names of employees on behalf of whom payments were made to the Fund and regularly received booklets, literature and correspondence from the Fund.

On April 15, 1965, listing Elmhurst as his only employer, Moglia filed an application for a pension with the Fund and thereafter respondents, as Trustees of the Fund, rejected the application.

It is uncontroverted that Moglia's age, length of service, and other qualifications for benefits under the Pension Plan of the Fund at the time of filing his application for a pension, and up to the time of his death, were such that, if he were entitled to benefits under the Pension Plan, he would have been entitled to payments for life commencing May 1, 1965, at the rate of $200.00 per month. If Moglia was entitled to these payments and he did not receive any of them during his lifetime, petitioner. as his widow, would be entitled, pursuant to the provisions of the Pension Plan, to receive them for a period of thirty-six months, commencing May 1, 1965.

Reasons for Granting the Writ

That the denial of pension benefits to petitioner, and to her husband prior to his death, is a grave injustice is admitted by all involved. The Trustees have alleged that their decision is based upon advice of counsel and their good faith interpretation of their duties and obligations as fiduciaries of the Fund. Their counsel has freely expressed his regret that his interpretation of the applicable statute and trust instruments left him no recourse but to advise the Trustees against paying the pension benefits. Throughout the proceedings before him, Judge Ryan repeatedly declared his determination, if at all possible, to direct payment of the pension benefits. And, the Court of Appeals found petitioner's case to be "compelling and . . . appealing" (App. C, p. 29a).

The one person clearly and wholly innocent of any wrong doing and without fault in this matter is the petitioner, as was her husband before his death (App. C, p. 28a). According to the District Court, in arguing that to pay the benefits sought by petitioner they would be violating Section 302 of the Act, the Trustees acknowledge that, in accepting the payments from Elmhurst, they were guilty of violating the statute, because acceptance of the moneys

by the representative of the employees is what is literally and expressly prohibited by the statute (App. B, p. 15a). Under these circumstances, to deny to petitioner the relief sought by her (as to which all agree she is morally, if not legally, entitled) and to allow the Trustees (the very ones responsible for permitting "the state of affairs to reach this deplorable condition"—App. C, p. 34a) to escape with a reprimand and a warning (App. B, pp. 17a-18a; App. C, pp. 33a-34a), is to plead impotence in the face of a grave and manifest injustice.

The effect of the holding in this case is bound to affect the pension rights not only of the petitioner but of literally thousands of others all over the United States. This is by no means an isolated instance (App. C, p. 33a). According to counsel for many Taft-Hartley Pension Funds, the practice of trustees of such funds of accepting employer contributions without checking their office records to verify the existence of executed written agreements with individual employers before accepting such payments is quite common. Notwithstanding the absence of such executed written agreements, the trustees of such funds have over the years been making payments of pension benefits to the intended beneficiaries on advice of some counsel that the required written agreement need not be executed or on the advice of other counsel that the statutory requirement of a written agreement is limited to employer contributions made into the fund and does not affect the right of the intended beneficiaries to receive pension benefits. Such conflict of opinions among counsel is in part attributable to the fact that the decision of the Court of Appeals herein is the first of any appellate court dealing with the statutory requirement of a written agreement and its applicability to the payment of pension benefits to the intended beneficiaries of Section 302 trust. Since this case concerns the interpretation of basic statutory requirements for participation in union pension funds established and maintained pursuant to the Taft-Hartley Act and is of

vital importance to the administration of such funds throughout the country, and the interpretation thereof affects the rights of pensioners, their widows and orphans, to pension benefits, the need for a definitive ruling by this Court is clearly indicated.

I. The Statutory Requirement of a Written Agreement

The District Court, in denying petitioner's and granting respondents' motion for summary judgment, and the Court of Appeals, in affirming, concurred in the belief that the absence of an executed written agreement between Elmhurst and Local 282 detailing the basis upon which payments were to be made by Elmhurst, on behalf of its employees, into the Fund, pursuant to subsection 302(c)(5)(B) of the Act, is fatal to petitioner's demand for pension benefits (App. B, p. 14a; App. C, pp. 26a, 30a-32a). As Circuit Judge Waterman has phrased it: "Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302, and the intended beneficiary of the illegal employer contributions has no legal right under Section 302 to the benefits normally derived from employer contributions to the trust fund" (App. C, pp. 27a-28).

Admittedly, in the absence of any agreement specifying the detailed basis on which payments are to be made into the Fund, there is no valid Section 302 trust. However, when there is in existence a collective bargaining agreement specifying the detailed basis on which payments into the Fund are to be made (as there is here) and payments are made into the Fund in accordance with the terms thereof (as there were here), then the statutory requirement is satisfied even though there is no executed agreement between an individual employer and the Fund. Analysis of Section 302 of the Act and examination of the authorities lend support to this position.

Section 302(a) of the Act prohibits the payment by an employer of "any money or other thing of value" to a representative of employees employed in an industry affecting commerce. Section 302(b) prohibits the receipt of such payment by such an employee-representative. Section 302(c) carves out five specific exceptions whereby payments, otherwise prohibited by subsections (a) and (b), are permitted, the fifth of which, (c) (5), relates to payments to welfare funds and provides that the prohibitions specified in (a) and (b) of the section do not apply to payments made to a trust fund established for the sole and exclusive benefit of the employees of such employer, and their families and dependents.

There are a number of safeguards thrown about subdivision (c) (5) in order to assure that the trust so established is *bona fide* and that there is proper administration thereof. According to (A), "such payments" must be held in trust "for the purpose of paying . . .for the benefit of employees, their families and dependents . . . pensions on retirement or death of employees . . .". (B) provides that there must be a written agreement with the employer specifying the detailed basis on which "such payments" into the fund are to be made and that there must be equal representation of employees and employers in the administration of such fund, and, finally, (C) requires that "such payments" are to be made to a separate fund "which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities". (Since the denial of pension benefits to petitioner are predicated upon the absence of the written agreement provided for in (B), it may not be amiss at this time to note that (A), (B) and (C) refer to "such payments", meaning thereby payments made into the fund, and not payments made to employees, their families and dependents for whose benefit the fund was established and on whose behalf payments have been made into the fund by the employer.)

The reasons impelling Congress to enact Section 302 of the Act were stated by Mr. Justice Stewart in Arroyo v. United States, 359 U. S. 419, at 425-426:

> "The provision was enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.
>
> ". . . Those members of Congress who supported the amendment were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control . . .
>
> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established."

As for the purpose that Congress had in mind in the enactment of subsection (c)(5), it is clearly spelled out therein. Furthermore, (A) expressly provides that the payments made for the sole and exclusive benefit of the employees, and their families and dependents, must be held in trust for the purpose of paying for the benefit of such persons, among other things, pensions on retirement or death of employees. It is precisely because the courts are cognizant that in making this exception, (c)(5), Congress intended to encourage and foster the creation and extension of union welfare funds, that they have invariably leaned

backwards in upholding the right of employees and their dependents to union welfare benefits. *United Mine Workers* v. *Daniel* (1958, Ky.) 317 S.W. 2d 183; *Forrish* v. *Kennedy* (1954) 377 Pa. 370, 105 A. 2d 67; *Thomas* v. *Kennedy* (1955) 57 Lack. Jur. 85, 7 Pa. D.&C. 2d 613, aff'd 387 Pa. 636, 130A. 2d 97; *Hobbs* v. *Lewis* (1958, D.C., D.C.) 159 F. Supp. 282.

The reason for requiring a written agreement specifying the detailed basis on which payments into the fund are to be made, (c)(5)(B), is to "define with specificity" (*Arroyo* v. *United States*, supra, at p. 426) the payments to be made into the fund. In the absence of such a provision, Congress believed that pension and welfare funds might be employed as a cloak for the commission of acts prohibited by (a) and (b) of Section 302 of the Act, or to perpetuate control of union officers, or for political purposes. The congressional scheme was designed to prevent such abuses by requiring that payments into the fund be made in accordance with an instrument spelling out in such detail and with such exactitude the payments to be made that the administration of the funds' assets could be controlled and checked by union members, employer-representatives and governmental agencies. Congress was not concerned with the form of the instrument but with its substance. To carry out the congressional purpose it does not matter whether the instrument be a collective bargaining agreement, trust agreement or any other document as long as it specifies the detailed basis on which payments into the fund be made. The reason why the statute calls for an agreement is presumably because Congress assumed that the provisions specifying the basis of the contributions would be incorporated in a collective bargaining or trust agreement. The reason why Congress did not specify the kind of agreement is because its form does not matter, provided it spells out with a fair degree of specificity the basis on which payments into the fund be made.

That the collective bargaining agreement of Local 282, printed together and attached to the Trust Agreement, satisfies the statutory requirement in giving the detailed basis upon which the employers are required to contribute to the Fund, has not been questioned. Had Elmhurst, therefore, been a party to this collective bargaining agreement (which, in fact, it was by reason of its conduct and actions in observing the terms of the agreement insofar as payment of uniform union scale wages and making contributions to the Fund, which payments were accepted by the Fund, and the correctness of which payments were regularly verified by the auditors for the Fund) petitioner's right to pension benefits would not be in dispute. In denying to petitioner the relief sought by her, both courts below have done so solely because of the absence of an executed written agreement between Elmhurst and Local 282 (App. B, p. 13a; App. C, pp. 31a-32a). In holding that the written agreement with the employer must be executed, both courts have overlooked the fact that subsection (c)(5)(B) of the Act requires only that there be a written agreement; there is no requirement that the agreement be signed. It was so held in *Dunbar* v. *Painters & Glaziers Dist. Coun.* (D.C., D.C., 1955) 129 F. Supp. 417 at 423:

> "The words are: 'The detailed basis on which such payments are to be made is specified in a written agreement with the employer.' It has been argued on one side that this language should be strictly construed. It has been argued on the other side that it should be liberally construed. It has been argued that it means a signed agreement. The other side contends that it means an agreement reduced to writing, if there is a meeting of minds and an assent thereto.
>
> "The Court rules as a matter of law that this requirement of the Taft-Hartley Act is nothing more than the requirement that there shall be a written agreement. It does not declare that it shall be a signed statement. If that were necessary, Congress undoubtedly would have put it into the act itself."

The failure of Congress to require that the written agreement be signed, stronly reinforces petitioner's position that to satisfy the requirement of subsection (c)(5)(B) of the Act it is merely required that there be in existence a written agreement specifying the detailed basis on which payments into the fund are to be made (as there was here) to which the employer assents either expressly or by making payments into the fund in accordance with the terms of the existing instrument (as was done here by Elmhurst). It is precisely because Congress had in mind a situation such as there is here that it did not require that the agreement be executed.

II. The Applicability of the Principle of Equitable Estoppel

In response to petitioner's request that the Court invoke the theory of equitable estoppel as a basis for allowing pension benefits from the Fund, the Court of Appeals, without passing on the merits of petitioner's argument insofar as it is directed to respondents' invocation of the terms of the trust agreement to deny her any pension benefits, ruled that the absence of the essential element of the written agreement required by subsection 302(c)(5)(B) barred its invocation (App. C, p. 29a).

The arguments already advanced have, it is believed, demonstrated that the statutory requirement of a written agreement, (c)(5)(B), has been fully satisfied. By the same reasoning it has also been established that Elmhurst was in fact a party to Local 282's collective bargaining agreement. But, even if that were not so, for the Trustees to base their refusal to grant to petitioner pension benefits on the asserted absence of a collective bargaining agreement, as called for by the Fund's trust instrument, when it was their conduct, which Judge Ryan has charitably characterized as "grossly negligent" (App. B, p.

17a), which was responsible for the acceptance of Elmhurst's monthly contributions for over twelve years in what they assert (but petitioner does not) is in express violation of Section 302(b) of the Act and of their fiduciary obligations as Trustees, borders on the outrageous.

The one person clearly and wholly without fault in the matter is the petitioner, as was her husband before his death. Moglia was a member in good standing of Local 282 from 1937 to the time of his death. Elmhurst contributed to the Fund on his behalf for over twelve years, and the Trustees received and accepted its contributions. Elmhurst' books were regularly audited by the Fund's auditors. The Fund corresponded with Moglia and Elmhurst regarding various aspects of the trust. Moglia knew of the existence of the trust, relied on it, and looked to its Plan for benefits in times of sickness, old age, and even in death. It was only sometime after having retired and filed his application for a pension that he was advised by the Trustees that they were questioning his right to pension benefits because of their claim, made for the first time, that there was no written agreement between Elmhurst and Local 282.

Under these circumstances, to paraphrase this Court in *Kirk* v. *Hamilton,* 102 U.S. 68, at page 79: The Trustees should not now be heard to say that that is not true which their conduct unmistakably declared was true and upon the faith of which Moglia acted.

III. Elmhurst's Adoption and Ratification of the Collective Bargaining Agreement

The Court of Appeals rejected petioner's argument that Elmhurst's conduct and action in observing the terms of Local 282's collective bargaining agreement attached to the trust instrument by paying uniform union scale wages and by making contributions to the Fund were tantamount

to ratification and adoption of a written agreement by Elmhurst, even though it had not signed it, on the ground that the statute required execution of the written agreement and on the further ground that two essential elements of a contract, mutuality of agreement and mutuality of obligation, were lacking (App. C, pp. 30a-32a).

It has already been shown that subsection 302 (c) (5)(B) does not require that the written agreement be signed (*Dunbar* v. *Painters & Claziers Dist. Coun.* supra).

It is not subject to dispute that Elmhurst, while it did not formally affix its signature to the printed form of the collective bargaining agreement promulgated by Local 282, indicated its knowledge of, and acquiescence in, the terms thereof, both by its employment of teamsters who were members of Local 282 and by its contributions to the Fund. Since Elmhurst would not have been entitled to the services of members of Local 282 unless it agreed to such terms, there is valid legal consideration for the implicit agreement between Elmhurst and Local 282 to make payments to the jointly administered Fund.

This implicit agreement is fortified by a long and continued course of conduct on Elmhurst's part. From at least 1937 to April, 1965, Elmhurst employed members of Local 282 and paid them uniform union scale wages. Elmhurst's payments into the Fund had continued from July 1, 1953, through March 31, 1965, without interruption, and the Trustees throughout that period had accepted Elmhurst's monthly contributions into the Fund, and their auditors had regularly audited Elmhurst's books.

These acts and this course of conduct on the part of both Elmhurst and the Trustees are sufficient to spell out mutuality of agreement as well as mutuality of obligation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

January 28, 1969

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APPENDIX A

(Judgment of Affirmance of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of November, one thousand nine hundred and sixty-eight.

Present:

HON. STERRY R. WATERMAN,
HON. WILFRED FEINBERG,
Circuit Judges,

HON. ROBERT C. ZAMPANO,
District Judge.

KATHLEEN MOGLIA,
Plaintiff-Appellant,

v.

JAMES GEOGHEGAN, PHILIP STACK, BENEDICT CIAVOLELLA, JOHN CODY, FRANK M. CAMPBELL, CHARLES J. MURPHY, FRANK L. KELLY, EDWIN E. REGNELL, JR., DUDLEY A. SAUNDERS, JOSEPH J. RYAN, WALTER SCHOFFMAN, ABRAHAM SCHWEBEL, CHARLES R. HERSEY and A. LAWRENCE GEROSA, as Trustees of Local 282 Pension Trust Fund,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Appendix A

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

(United States Court of Appeals Second Circuit, Filed November 6, 1968, A. DANIEL FUSARO, Clerk.)

APPENDIX B

(Opinion of District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

RYAN, J.:

Plaintiff and defendants have moved for sumary judgment. On the undisputed and stipulated facts, for the reasons hereinafter given, we have denied plaintiff's motion and granted defendants judgment on the merits.

Plaintiff is the widow of John J. Moglia, who at the time of his death on August 7, 1966 was a member in good standing of Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers. Plaintiff has filed this action under Section 302 of the L.M.R.A. (Section 186 Title 29, U.S.C.) for a judgment declaring that she, as Moglia's widow, is entitled to payments under the Pension Plan of Local 282—Pension Trust Fund, established under Section 302(c)(5) of the Act—of $200 per month for a period of 36 months commencing May 1, 1965 and directing the defendants, as Trustees of the Fund, to make such payments.

Defendants, Trustees, denying plaintiff's right to such payments from the Pension Trust Fund, have counterclaimed for judgment declaring that plaintiff is not entitled to the Pension Trust Fund payments she seeks.

Plaintiff contends that, since her deceased husband's employer had made payments to the pension trust fund on behalf of its employee, and the Trustees had accepted these payments, they should be and are equitably estopped from denying pension benefits to her.

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The defendants, Trustees' position is that, since the statute providing for pension trust funds requires the existence of an agreement spelling out the detailed basis on which payments to it are to be made, in the absence of such an agreement, the Trustees would be violating the statute if they were to make the payments sought, that their decision not to do so has been made in good faith and that there is no equitable estoppel requiring them to do otherwise.

It appears undisputed that Moglia, prior to his death and on April 15, 1965, had filed an application with the Trustees for a pension and that the Trustees had denied the application on the ground that Moglia's employer, Elmhurst Contracting Company, Inc. (from 1937 through March 31, 1965) had never signed a collective bargaining agreement with Local 282.

Although the complaint pleads to the contrary, it has now been stipulated by plaintiff that there never was a collective bargaining agreement between the employer of plaintiff's husband and the Union.

The motions before us present but one issue of law: may the defendants, Trustees, lawfully pay the pension benefits sought by plaintiff as the widow of an employee of Elmhurst, in the absence of a collective bargaining agreement and a written trust agreement between the employer and the Union. We have concluded that they may not.

We accept the following undisputed facts:

For many years prior to his death, decedent was a member in good standing of Local Union No. 282, a labor organization representing employees of employers engaged in industries affecting commerce within the meaning of Section 302(a)(2) of the Labor-Management Relations Act of 1947, as amended. From 1937 until April, 1965, the decedent was employed by Elmhurst Contracting Company, Inc., or its successor, both of which were employers within

the meaning of Section 302(a) of the Act. From July 1, 1953, through March 31, 1965, the employer of decedent made payments to the Fund on behalf of the decedent, and such payments were received and accepted by the Fund. On April 15, 1965, the decedent filed an application for a pension with the Fund and thereafter defendants, as Trustees of the said Fund, rejected this application for a pension.

The decedent's age, length of service, and other qualifications for benefits under the Pension Plan of the Fund at the time of filing his application for a pension, and subsequent thereto up to the time of his death, were such that, if he was entitled to benefits under the said Pension Plan, he would have been entitled to payments for life commencing May 1, 1965, at the rate of $200.00 per month. If the decedent was entitled to receive benefits for life commencing May 1, 1965, at the rate of $200.00 per month, the decedent not having received any such benefits up to the time of his death, plaintiff, as the surviving wife of the decedent would be entitled, pursuant to Article II, Section 8 of the Local 282—Pension Plan, as amended, to receive payments for a period of 36 months commencing May 1, 1965, at the same rate.

The collective bargaining agreements between Local 282 and employers of employees represented by it require regular specified payments to be made by such employers to the Fund on behalf of their employees. Elmhurst never signed a collective bargaining agreement with Local 282 but it made the payments apparently in the amounts required under the applicable collective bargaining agreement as though it had executed such agreement.

No claim is made that the Trustees acted in bad faith in refusing to make payments to plaintiff. It is uncontroverted that they are acting on advice of counsel. When Moglia's application on the basis of his employment with Elmhurst was received at the Trustees' office in April,

1965, a search was made by the Fund Administrator for a copy of the collective agreement and counterpart trust fund agreement, but none could be found. A further search was made by the Fund Administrator in the files of the Union Office and none found there; the Fund Administrator then inquired of the officials of the Union and was informed that none had ever been entered into in spite of the Union's many attempts to have Elmhurst execute one.

The claim of the Local that, for many years, it had attempted to have Elmhurst execute such an agreement and that it repeated its attempts recently after the rejection of plaintiff's application, is undisputed. [It appears that even of this late date such an execution could validate pension payments to plaintiff (*Bey* v. *Muldoon,* 217 F. Supp. 401).]

These facts were reported to the Trustees at their meeting on June 15, 1965 and action was deferred until they had consulted counsel. At the following meeting of Trustees, which decedent attended with his attorney, the Trustees were informed that Elmhurst had been paying into the Fund and that they had been accepting such payments into the Fund. On the opinion of their attorney that they could not legally pay Moglia pension benefits, they rejected his application and, on March 1, 1966, a check in the amount of $4,435.93, representing $3,500 paid on behalf of Moglia and other employees, was sent to Elmhurst, one of whose officers promptly returned it because he understood that Moglia's attorney was contemplating legal action. The sum remains segregated for Elmhurst subject to the Court's disposition of the action.

The Pension Trust Fund was created in 1955 by Local Union No. 282 with various employers who had entered into collective bargaining agreements with the Union and 14 Trustees—4 designated by the Union and 10 designated by the employers, exercising control by one vote each.

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It was founded by execution of an agreement and declaration of trust—the "Trust Agreement" as the successor to other trust funds in which the Union had theretofore participated.[1]

The condition precedent that there be a collective bargaining agreement is stated by the recital in the preamble that "the Union and the Employers have entered into written collective bargaining agreements requiring payments by the Employers for the purpose of providing a pension and welfare program for the employees covered by said agreements. . . .". The Trust Agreement (T.A.) and the Rules and Regulations of the Pension Fund (R & R) set forth the following definitions.

> Employer: Each employer who has duly executed a collective bargaining agreement with the Union and who is a signatory to this agreement, and also any employer not presently a party to such collective bargaining agreement who hereafter executes such agreement provided that such employer satisfies the requirements for participation as established by the Trustees and agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust, and becomes a party hereto. (Article I, §1, T.A.)
>
> Any employer who is obligated by his collective bargaining agreement with the Union to contribute to the Pension Trust Fund (Art. I, §4, R & R).
>
> Employee: All Employees covered by and who fulfill the conditions of the collective bargaining agreements in effect between the Employers and the Union (Art. I, §3, T.A.)

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[1] This agreement was amended through April 15, 1965 (the date on which plaintiff's husband applied for a pension), but in no significant respect as to its terms and definitions.

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Any person who is employed by an Employer in an employment for which the Employer is obligated by his agreement with the Union to contribute to the Pension Trust Fund (Art. I, §5, R & R).

Employer Contributions: Payments by Employers to either of the Trust Funds created in accordance with the collective bargaining agreement (Art. I, §7, T.A.).

Collective Bargaining Agreement: Any written collective bargaining agreement entered into between an Employer and the Union (Art. I, §11, T.A.).

Any written collective bargaining agreement executed by an Employer and the Union requiring contributions to the Pension Fund (Art. I, §9, R & R).

Under the Trust Agreement, the Union and the Employer created and established with the Trustees the Local 282 Pension Trust Fund with monies derived from Employer contributions "pursuant to written collective bargaining agreements made for the purpose of providing pension benefits," and empowered the Trustees to formulate rules and regulations relating to eligibility of Employees. It also provided that:

> "The Trustees shall have power to construe the provisions of this Agreement and Declaration of Trust and the terms used herein and any construction adopted by the Trustees in good faith shall be binding upon the Union, the Employees and the Employers." (Art. V, §3 T.A.).

The relevant provision of the Trust Agreement is Article V, Section 4. Section 4(a) permits the Trustees to pay necessary expenses. Section 4(b) states the only purpose for which the Fund may be used or applied is as follows:

> "(b) To pay or provide for the payment of retirement or other benefits to eligible Employees in

accordance with the terms, provisions and conditions of the pension plan to be formulated and agreed upon hereunder."

Under the Rules and Regulations, it is further provided that:

> "An eligible Employee who makes application in accordance with these rules shall be entitled, upon retirement, to receive the monthly benefit provided for the remainder of his life, subject to all the provisions of this Pension Plan." (Art. VI, §1, R & R).

Respecting Employers' contributions, it provided that:

> "detailed written reports shall be submitted to the Trustees by the Employers together with each payment . . . The Trustees may at any time audit the pertinent books and records of any Employer in connection with the above." (Art. VI, §1(c) T.A.).

and that

> "Each Employer shall promptly furnish to the Trustees on demand any and all records of his Employees' concerning the classification of such Employees, their names, social security numbers, the amount of wages paid, and hours worked, and any and all other payroll records and information that the Trustees may require in connection with the administration of the Trust and for no other purpose. Each Employer shall also submit in writing to the Trustees at such regular periodic intervals and in such form as the Trustees may establish such of the above data and information as may be requested by the Trustees. The Trustees, or their authorized representatives, may examine and audit the pertinent payroll books and records of each Employer whenever such examination or audit is

deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust." (Art. IX, §1 T.A.).

The Agreement also anticipates the disqualification of an Employee as defined in Article I and the cessation of benefits under the Pension Fund to the Employees, their wives and children (Art. VII, §§1 and 2).

Since 1959, a collective bargaining agreement typical of the collective bargaining agreements in effect between the Union and various employers has been printed together and physically attached to the front of the Trust Agreement. Section 12 of the Collective Bargaining Agreement in evidence (typical of the agreement in force when plaintiff applied for a pension) gives the detailed basis upon which the employers are required to contribute to the Fund—that is, the dollars and cents for each employee for each hour, the limit on the payments and the time when payments are due:

> "Section 12. The Employer shall contribute 17½¢ per hour (not to exceed $1.40 per day) (Effective January 1, 1964: 18½¢ per hour, not to exceed $1.48 per day) for each and every hour paid for, including regular work days, Saturdays, holidays and vacation days, to the Local 282 Welfare Trust Fund, and 33¢ per hour (not to exceed $2.64 per day) for each and every hour paid for, including regular work days, Saturdays, Sundays, holidays and vacation days, to the Local 282 Pension Trust Fund, the said contribution to be paid on or before the 10th day of each month covering all payroll periods ending during the preceding calendar month, or at such other intervals as may be required by the Trustees of said Funds. The Employers shall execute the Trust Agreement

governing the said Trust funds and shall comply with all requirements of the Trustees established pursuant to the Trust Agreement."

The Pension Plan itself, containing Rules and Regulations, is printed in a booklet which is mailed to each person on the mailing list kept by the Pension Fund Office. The mailing list, consisting of 7000 persons, contains the names of employees on behalf of whom payments have been made to the Fund. Plaintiff's husband's name was on this list and he apparently received one or more of these booklets.

While it is conceded by plaintiff that, to be an "employee" within the meaning of the Pension Plan, it is required that the employer be obligated by his agreement with Local 282 to contribute to the Fund, and that regulations established by the Plan and the Trustees will generally be upheld, she contends that they must be reasonable and fair and not in violation of either the letter or spirit of the Act.

This brings us to the statute and to the extent of the jurisdiction of this Court in the matter. We hold our jurisdiction to be limited to inquiry as to whether there has been a violation of the statute either in its letter or its spirit, and that there does not rest in the Court a general power to dictate, rephrase or interfere with the provisions of an agreement freely entered into between the Union and the Employers for the benefit of the employees, regulating coverage and eligibility, and imposing conditions on both. These are matters which the statute has entrusted to the Trustees (*Rittenberry* v. *Lewis*, 238 F. Supp. 506).

The statute mandates the very requirements for eligibility to participate in the Trust Pension Funds, which are set forth in the Trust Agreement Plan and in the Rules and Regulations of the Trustees. The provisions of the Plan and the Rules are in strict accordance with both the letter and spirit of the statute.

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Section 302(a) and (b). Title 29, U.S.C., provides:

> "(a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> • • •
>
> "(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."

Violations of Section 302 are misdemeanors punishable by a $10,000 fine, a year in prison, or both.

Section 302(c) carves out by subdivision (5) thereof very limited exceptions to this clear prohibition of money passing from management to labor, stating that the provisions of (a) and (b) shall not apply

> "(5) with respect to money or other thing of value paid . . . to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents. . . . PROVIDED, That (A) such payments are held in trust for the purpose of paying . . . pensions on retirement or death of employees . . . (B) the detailed basis on which such payments are

> made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such funds . . . and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held herein cannot be used for any purpose other than paying such pensions or annuities; . . .".

Conformity with the statutory requirement that the funds be used exclusively for employees of such employers and that the payments to provide pensions or annuities be made into a separate fund from which no other benefits were to be paid, was assured by limiting benefits for which payments might be made from the fund to benefits under a pension plan for employees, defined as those covered by collective bargaining agreements between their employers and the Union. So also was conformity with the requirement that the detailed basis on which the employer payments were to be made be specified in a written agreement with the employer, assuring by defining employers' payments as payments from employers who are required to make such payments pursuant to executed written collective bargaining agreements with the Union.

While the statute does not specify that the written agreements be a collective bargaining agreement, it certainly encompasses such an agreement or even two related contracts such as the parties here had—one for the purpose of establishing the Fund and for imposing conditions for membership in the Fund, and the other for specifying the basis of the contributions. The reported cases filed under this statute disclose that the usual trust fund agreements bottomed on a collective bargaining agreement. It is difficult to imagine a situation where it would be otherwise.

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The conditions imposed on the parties to the Trust Agreement Plan and the Rules and Regulations to enforce these conditions, are reasonable and fair, and drafted to adhere strictly to the statutory requirements. The background of this law and the cases interpreting it, leave no doubt that, if there is one essential element without which these funds cannot lawfully exist, it is that there be a written agreement specifying the source and amounts of money to be paid into and to be disbursed from the Fund. It was the absence of just such a formal agreement identifying and allocating the moneys being collected from employers by Union representatives ostensibly for the employees' "Welfare Fund", which outlawed those payments. Congress recognized that the effect of such gifts, if not their purpose, was to destroy the impartiality of the representative of the employees, whose interests often conflicted with those of the employer. *United States* v. *Ryan*, 350 U.S. 399; *I.L.A.* v. *Seatrain Lines*, 326 F. 2nd 916 (C.A. 2, 1964).

This is not, as plaintiff would argue, a technical provision or regulation, but the sine qua non of the payments permitted to be made.

This was pointedly observed in the holding that, "unless the payment by the employer falls in all respects within the provisions of § 302(c), both as to the substantive purpose and the procedural administration and written formalization, it violates §302(a) and (b)." *Bey* v. *Muldoon, supra.*

The cases cited by both parties are in support. In *Dunbar* v. *Painters & Glaziers Dist.*, 129 F. Supp. 417, the Court would not permit the employers who had a collective bargaining agreement as well as a trust agreement to attempt to escape the provisions of the trust agreement requiring them to contribute. In *Rittenberry* v. *Lewis, supra,* it emphasized the requirement that for an employee to receive benefits he must be an employee of a "contributing employer" who has paid into the fund, i.e., like a party to

a group insurance plan. In *Blassie* v. *Kroger*, 345 F. 2nd 58, it expressly upheld the necessity under Section 302(c)(5)(B) of a written agreement for "employers subject to collective bargaining procedure with the union," as distinguished from the Fund's employees whose employer was obviously not so subject. And *United States* v. *Ryan, supra,* brushed away all narrow notions of the meaning of the term "representative of employees" as used in the statute, to include Union Trustees. *Shapiro* v. *Rosenbaum,* 171 F. Supp. 875, illustrated this by permitting payments to trustees of a trust, who were totally disassociated in any capacity with any labor union or group of employees, in the absence of the written agreement required by the statute.

Defendants' contentions that payments here sought are prohibited by the statute, are thus well supported. Of course, such argument acknowledges that in accepting the payments from "Elmhurst" for the past 13 years with knowledge, if not actual, certainly imputed, the Trustees were also engaged in violating the statute because acceptance of the moneys by the representative of the employees from the employer is what is literally prohibited by the statute, and by necessary and logical extension, the distribution of those moneys to the employees. If receipt is unlawful, paying out is equally unlawful. As defendants say: "Trustees who accept payments from employers must be certain that the requirements are fully satisfied. Laxity is not excused by good intentions."

Plaintiff argues that the purpose of the statute is to benefit the employee; that this was what "Elmhurst" was engaged in doing with the knowledge of the Trustees; that the payments were for the benefit of the employees and not adverse to their interests; that plaintiff and her husband knew this and, relying on these payments, looked to them for their future security; and that to deprive them of

the expected benefits through a technicality is what will work the injury. While such an argument is emotionally appealing, it is not relevant.

Assuming that plaintiff's husband, a union member of long standing, did not know that his employment was not covered by a collective bargaining agreement, but, because pension fund payments were being made, he assumed that he was, in fact, covered, we find that he knew of the requirement of a collective bargaining agreement. The motives and purposes of "Elmhurst" and of the Trustees are immaterial. The statute is not limited to conscious wrongdoing. It condemns, outside of the stated exceptions, any and all gifts, no matter how trifling and innocuous; no matter what their motive, and it might be one of pure friendship or generosity; and no matter the circumstances. *United States* v. *Ryan*, 232 F. 2nd 481 (CA 2, 1956); ILA. v. *Seatrain Lines, supra.* Had Congress wanted to except all payments, which were clearly for the benefit of the employees, it could have done so; it did not provide for such broad exceptions. If such a conclusion sounds heartless, it is well to note that, even in this seemingly innocent situation, there lurks a real evil—and it is that this was not an isolated instance for "Elmhurst" apparently attempted to make payments for other employees besides plaintiff's husband. Voluntary as these payments were, while these employees were in favor, the payments might continue; if the employees fell out of favor, the payments could be reduced or completely stopped, with no recourse on their part, placing them in the unenviable situation of being at their employer's mercy in this most important respect; not to mention, of course, the discriminatory treatment among them if only some and not all were attempted to be benefited. Making an exception of this case would frustrate the purpose of the statute, which is to benefit and promote the welfare of the employee. For, to pay out from a common

fund in which all employees have a common as well as a separable right to employees not covered by collective bargaining agreements equally with those so covered, would certainly undermine the strength of collective bargaining, with resultant prejudice to the employee. It would encourage employers not to enter into them, if they could procure for their employees, at will and whim, benefits similar to those so covered without obligating themselves to any of the other conditions. It also would prevent the setting up of Trust Funds on "a financially or actuarily sound basis." *Rittenberry* v. *Lewis, supra.* All of these are evils which the written collective bargaining agreement and the Trust Fund agreement would obviate. The deliberateness of "Elmhurst's" conduct in this respect and its indifference to plaintiff's situation, is evidenced from the fact that, although it could still legalize these payments and permit the pension benefits to be paid to plaintiff by entering into a collective bargaining agreement and a Trust Agreement now, it has refused to do so. *Bey* v. *Muldoon, supra*; see also Sec. I, Art. I, T.A.

It follows from this that plaintiff's theory of estoppel will not lie to compel the Trustees to continue violating the law, assuming that the other elements necessary to constitute an estoppel in law were present and which appear unlikely in view of the fact that, by receiving the booklets describing the Pension Fund and "eligible employees", plaintiff's husband was constantly put on notice that his employment had to be covered by a collective bargaining agreement before he could enjoy the benefits of the Fund.

Our conclusion is not to be interpreted as condoning the actions of the Trustees here, especially those of the Union Trustees; that, at best, they were grossly negligent is clear; how, in the face of the detailed reports required to be filed by a contributing employer specifying name, date, salary,

of the audits required of an employer's books and payroll records—which it appears here they did conduct on a spot check basis—they could go on for these many years not knowing that "Elmhurst" was not covered by a collective bargaining agreement, when all the time the Union was allegedly making unsuccessful attempts in this direction, is really beyond our understanding. But the fact that the situation is a suspicious and strange one is a still further reason for not permitting any further opportunity to evade the statutory requirements.

The motion of plaintiff for summary judgment is denied and that of defendants for summary judgment is granted; the complaint is dismissed with costs and the Clerk is directed to forthwith enter such judgment.

SYLVESTER J. RYAN
U.S.D.J.

Dated: April 27, 1967.

APPENDIX C

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 482—September Term, 1967.

(Argued June 4, 1968 Decided November 6, 1968.)

Docket No. 31450

[SAME TITLE]

Before:

WATERMAN and FEINBERG, *Circuit Judges*,
ZAMPANO, *District Judge.**

Plaintiff-appellant, a widow, sought a declaratory judgment of entitlement to pension payments from a trust fund created from employer contributions that were presumably made within the exceptions permitted under Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U. S. C. § 186(c)(5). The Trustees of the fund had refused payment on the ground that the employer of appellant's deceased husband had never entered into any written agreement required by Section 302 if the employer contributions were not to be proscribed under that section. The court below, United States District Court for the

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* Of the District of Connecticut, sitting by designation.

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Southern District of New York, Ryan, *J.*, dismissed the complaint. Affirmed.

HERMAN ENGLANDER, Englander & Englander, New York City, *for Plaintiff-Appellant.*

SAMUEL J. COHEN, Stanley M. Berman, Cohen and Weiss, New York City, *for Defendants-Appellees.*

WATERMAN, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, dismissing plaintiff-appellant's complaint. Appellant sought a declaratory judgment pursuant to 28 U. S. C. §2201 and Rule 57, Fed. R. Civ. P., declaring her to be entitled to receive payments under the Pension Plan of Local 282-Pension Trust Fund of $200.00 per month for a period of thirty-six months commencing May 1, 1965; directing appellees, as trustees of said Fund, to make such payments; and awarding her any reasonable attorney's fees incurred by her in enforcing the trust. Jurisdiction in the district court was founded on the existence of a question arising under a statute of the United States regulating interstate commerce, the Labor-Management Relations Act of 1947, §302, 29 U. S. C. §186, making the action one of which the district court had original jurisdiction pursuant to 28 U. S. C. §1337. Appellees moved for summary judgment on the ground that appellant was not entitled to the relief she sought. Appellant also moved for summary judgment. Appellant's motion was denied and appellees' motion was granted. The learned district judge explained the result he reached in a reasoned opinion which contained the detailed facts involved. His opinion is reported at 267 F. Supp. 641 (1967). We affirm the result reached below.

Appendix C

Appellant is the widow of John J. Moglia (Moglia) who died on August 7, 1966. At all times relevant to this case Moglia had been a member in good standing of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 282 (Local 282), a labor organization representing employees of employers within the meaning of Section 302(a)(2), Labor-Management Relations Act of 1947; 29 U. S. C. § 186(a)(2).

Appellees are the Trustees (Trustees) of the Local 282-Pension Trust Fund (Fund) which was established in 1955 by Local 282 and various employers who had entered into collective bargaining agreements with the Local. The Fund was the successor of other trust funds in which the Local had theretofore participated and was created by execution of an agreement and declaration of trust (trust agreement).

The trust agreement authorized the Trustees to receive payments from employers who signed collective bargaining agreements with the Local requiring such payments. The trust agreement specified that the Fund be used to provide retirement benefits for employees of contributing employers pursuant to a Pension Plan to be formulated by the Trustees.

The Fund was supposed to be maintained in strict conformity with Section 302(a) and (b) and with Section 302(c)(5) of the Labor-Management Act of 1947. Section 302(a) and (b) provide as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or

> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
>
> • • •
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

Violations of Section 302 are punishable by criminal penalties. Section 302(d) provides:

> (d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Section 302(c)(5) establishes *limited* exceptions to subsections (a) and (b) for payments to trust funds which meet *specified* requirements. The statutory requirements are that the employer's payments be made

> . . . to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care,

pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pension or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

The trust agreement was written to conform with the statutory mandate and spelled out limitations upon pay-

ments into and out of the Fund. It is uncontroverted that the trust agreement at all times contained the limitations required by Section 302.

From July 1, 1953, through March 31, 1965, Moglia's employer for twenty-eight years, Elmhurst Contracting Co., Inc., or its successor (Elmhurst), made payments into the Fund on behalf of Moglia and other employees and such payments were received and accepted by the Fund. During this period, the books of Elmhurst were regularly audited by auditors for the Fund to assure that the payments being made were in the proper amounts.

On April 15, 1965, listing Elmhurst as his only employer, Moglia filed an application for a pension with the Fund. It is uncontroverted that Moglia's age, length of service, and other qualifications for benefits under the Pension Plan of the Fund at the time of the filing of his application for a pension, and up to the time of his death, were such that, if he were entitled to benefits under the Pension Plan, he would have been entitled to payments for life commencing May 1, 1965, at the rate of $200.00 per month. If Moglia was entitled to these payments and he did not receive them during his lifetime, appellant, as his widow, would be entitled, pursuant to the provisions of the Pension Plan, to receive them for a period of thirty-six months, commencing May 1, 1965.

For some reason, the Fund does not investigate pension eligibility until after an application for pension benefits has been filed, and, after Moglia applied, an investigation of Elmhurst's status with the Fund revealed that Elmhurst had never entered into a collective bargaining agreement or a pension trust agreement with the Local although the Local had often requested it to do so.

The facts surrounding Moglia's application were reported to the Trustees at a meeting on June 15, 1965, but action on the application was deferred until the Trustees

had an opportunity to consult with counsel. They were advised by counsel that payment to Moglia was prohibited by the Labor-Management Relations Act of 1947 and by the trust agreement, and that Moglia's application must be denied. They were also advised that the Labor-Management Relations Act of 1947 and the trust agreement prohibited them from accepting Elmhurst's payments. Accordingly, Moglia's application was rejected by the Trustees, and all the Elmhurst payments were refunded to Elmhurst. Elmhurst refused to accept the refund pending termination of the present litigation, and its payments are now being held apart from the rest of the Fund to be disposed of in accordance with the final determination of this action.

The question presented to us by appellant is whether she is entitled to receive pension benefit payments from the Local 282-Pension Trust Fund notwithstanding the fact that there never has been a written collective bargaining agreement or any other written agreement between Elmhurst and Local 282 detailing the basis upon which payments were to be made by Elmhurst, on behalf of its employees, into the Trust Fund. The answer to this question involves a construction of the relevant language of Section 302 of the Labor-Management Relations Act of 1947.

Appellant first contends that the written agreement requirement contained in subsection 302(c)(5)(B) applies only to payments made by employers into the Fund and not to payments made by the Trustees out of the Fund to employees, and, therefore, the Trustees would not be violating Section 302 by making payments to appellant.[1]

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[1] We are of the belief that the question of whether the written agreement requirement of Section 302 applies to payments out of the Fund would only arise if, though there were an employer-union written agreement specifying the basis of employer contributions into the Fund, there was no written agreement setting forth the basis upon which the Fund's monies were to be dispersed. In passing,

However, we hold that, inasmuch as both Elmhurst's payments into the Fund and the Trustees' receipt of said payments were prohibited by Section 302 in the absence of a written agreement as required by subsection 302(c)(5)(B), appellant was not a person who could, under Section 302, lawfully be paid pension benefit payments from the Trust Fund.[2]

Section 302 was originally passed as part of the Taft-Hartley Act of 1947. The Section's purpose was to curb the abuses, discovered by Congress after extensive investigation, which seemed to be inherent in funds created and maintained by contributions exacted from employers but which were administered by union officials without any obligation to account to the contributors or the union membership. See, e.g., 92 Cong. Rec., Part 4, 79th Cong., 2d Sess. 1946, p. 4893 (Senator Byrd), p. 4897 (Senator Knowland), p. 4894 (Senator Ball); S. Rep. No. 105, 80th Cong., 1st Sess., 52 (1947); 93 Cong. Rec., Part 4, 80th

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we note that it is unlikely that Congress, intending to insure that employer contributions to union funds were only for a proper purpose and specifying in detail the manner in which a union pension fund might be established through employer contributions, did not also intend that the manner in which payments were to be made out of the trust fund should be set forth in a written agreement. See *Lewis* v. *Seanor Coal Co.*, 382 F. 2d 437 (3 Cir. 1967), cert. denied, — U. S. —, 88 S. Ct. 1035 (1968).

[2] *Blassie* v. *Kroger Company*, 345 F. 2d 58 (8 Cir. 1965), cited by appellant, is not contrary to our holding. *Blassie* did not involve pension benefits to employees of employers contributing to a pension trust fund. It involved an entirely different and narrowly limited question, namely whether the trustees of a pension fund could legally pay pension benefits to the fund's own employees as part of their compensation. The court held that such payments were not prohibited by Section 302(a) and (b). The court stated that subsection 302(c)(5)(B)'s requirement of a written agreement applied only to employers subject to collective bargaining with the union and not to the fund vis-a-vis its own employees.

Cong., 1st Sess. 1947, p. 4678 (Senator Ball), p. 4678 (Senator Byrd), pp. 4746 and 4747 (Senator Taft). In 1959, Section 302 was amended to include within its ambit conduct which had been held to be outside Section 302 but conduct that Congress felt was of the type Section 302 was originally aimed at prohibiting. 1959 U. S. Code Cong. & Ad. News, 2326-30, 2360; 2469-70. A reading of the legislative history of Section 302 shows that Congress intended to prohibit the establishment of any union funds by means of employer payments unless the funds conformed in all respects with the specific dictates of Section 302(c). E.g., 92 Cong. Rec., Part 4, 79th Cong., 2d Sess. 1946, *supra;* 93 Cong. Rec., Part 4, 80th Cong., 1st Sess. 1947, *supra;* 1959 U. S. Code Cong. & Ad. News, *supra;* see *International Longshoremen's Ass'n* v. *Seatrain Lines, Inc.,* 326 F. 2d 916, 919-920 (2 Cir. 1964); *Bey* v. *Muldoon,* 217 F. Supp. 401 (E. D. Pa. 1962).

Under Section 302, *any* payment made by an employer to an employee representative, and this includes trustees administering a pension trust fund, see, e.g., *United States* v. *Ryan,* 350 U. S. 299 (1956); *Sheet Metal Contractors Ass'n* v. *Sheet Metal Workers International Ass'n,* 248 F. 2d 307 (9 Cir. 1957), *cert. denied,* 355 U. S. 925 (1958), *contra, United Marine Division, I. L. A., Local 333* v. *Essex Transportation Co.,* 216 F. 2d 410 (3 Cir. 1954), and the receipt of such payments by an employee representative are absolutely forbidden unless there is a written agreement between the employer and the union specifying the basis upon which the payments are made. Thus, in the case of a legally established union pension trust fund, the only employer contributions which may be accepted by the trustees administering the fund are those contributions from employers who have a written agreement with the union as required by subsection 302(c)(5)(B). Absent the

written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302, and the intended beneficiary of the illegal employer contributions has no legal right under Section 302 to the benefits normally derived from employer contributions to the trust fund. Only employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust. *Rittenberry* v. *Lewis*, 238 F. Supp. 506 (E. D. Tenn. 1925); *Bolgar* v. *Lewis*, 23 F. Supp. 595 (W. D. Pa. 1960).

Appellant makes an appealing argument that Congress intended to encourage and foster the creation and extension of union welfare funds and therefore that this court should not construe Section 302 so as to deny appellants the benefits of this welfare fund. As pointed out by the court below, acceptance of appellant's argument would not necessarily implement the congressional intention although it would provide benefits for the appellant. The reason for the rigid structure of Section 302 is to insure that employer contributions are only for a proper purpose and to insure that the benefits from the established fund reach only the proper parties. *Schwartz* v. *Associated Musicians of Greater N. Y., Local 802*, 340 F. 2d 228, 233-234 (2 Cir. 1964). Any erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted. See *Arroyo* v. *United States*, 359 U. S. 419, 423-427 (1959); cf. *International Longshoremen's Ass'n* v. *Seatrain Lines, Inc., supra* at 920.

Our construction of Section 302 may work a hardship in the instant case, especially as neither appellant nor her deceased husband appear to have engaged in any wrongful conduct; but we consider the construction of the statute

that we have adopted is the only acceptable one in light of the congressional history and intent. Of course this does not preclude appellant from pursuing any other remedies that may be available to her.[3]

Appellant also asks the court to invoke the theory of equitable estoppel as a basis for allowing pension benefits from the Trust Fund. Appellant argues that the Trustees, having accepted Elmhurst's contributions into the Fund for twelve years, and having regularly audited Elmhurst's books in order to assure that payments were being made in the proper amounts, are estopped from denying pension benefits to appellant on the ground that there was no written agreement between the Local and Elmhurst. Whatever merit this argument may have if directed to the appellee trustees' invocation of the terms of the trust agreement to deny appellant at this late date any pension benefits, a matter we need not decide, the equitable estoppel argument cannot supply the essential element of the written agreement Congress required by subsection 302(c)(5)(B).

The statutory requirement of a written agreement is not a minor technicality which may be dispensed with when, there being no written agreement, the acts of one party may be said to estop him from defending on that ground. A written agreement is necessary before payments may be made under the section. As compelling and as appealing as appellant's case is, the structure of the section and the

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[3] Our decision in this case does not preclude appellant from seeking further appropriate relief, such as turning over to her the payments already made on her husband's account by Elmhurst to the trustees. Possible grounds upon which recovery might be predicated such as, for instance, unjust enrichment or constructive trust, are still open to appellant inasmuch as it would appear that such causes of action are not yet time-barred by the applicable New York statute of limitations. See New York Civil Practice Law and Rules, McKinney's Consol. Laws, c. 7-B, Section 213 (1963). Nor do we preclude the trustees from taking affirmative action to have the sums which Elmhurst refused to take back paid over to appellant.

Congressional intent underlying the section preclude any judicial inroads into its rigid, specific requirements.[4]

Appellant conceded in the district court that at no time relevant to the cause of action asserted in her complaint there was a collective bargaining agreement or any other written agreement, as such, between Elmhurst and the Local.[5] Appellant, now, without intending to qualify her

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[4] In support of her estoppel argument appellant points to *William Dunbar Co.* v. *Painters & Glaziers District Council,* 129 F. Supp. 417 (D. D. C. 1955). There the plaintiffs were employers who sought to enjoin collection of their own payments by a trust fund on the ground that a written agreement had never been signed. The district court, sitting as trier of the facts, concluded:

> The Court does find, so far as the execution of this document is concerned, that it was signed in fact. Whether it is in the status of a lost, misplaced document, or not, there has been a sufficient showing, in the absence of the original, to convince this Court that this document was given life by formal signatures and did exist as a trust obligation. 129 F. Supp. at 422.

The court went on to state in dicta that the employers had been operating under the terms of the trust agreement for years, and hence were estopped from denying that the agreement was valid. This dicta upon which appellant relies is inapposite. It only dealt with the question of whether the employers who had caused a trust fund to make pension payments to their employees could at a later date deny that they had signed a written agreement under which they had been operating for years. In the present case all agree that Elmhurst never signed an agreement with the union.

[5] Plaintiff alleged in her complaint that there had been a collective bargaining agreement between Elmhurst and Local 282. This was controverted by the Trustees. Cross-motions for summary judgment followed and were denied. Subsequently plaintiff stipulated that:

> Notwithstanding the allegations contained in . . . [the] complaint . . . or reply, and notwithstanding any statement to the contrary contained in any of the papers submitted in support of plaintiff's motion for summary judgment . . . [the appellant] unconditionally admit[s] that at no time relevant to the cause of action asserted in the complaint was there a collective bargaining, or any other written agreement, between Local Union No. 82 [sic] and either Elmhurst or its successor, either requir-

concession, argues that the written agreement requirement of subsection 302(c)(5)(B) was, in fact, satisfied in the instant case. Appellant contends that subsection 302(c)(5)(B) only requires a written agreement and not a signed, written agreement, *William Dunbar Co.* v. *Painters & Glaziers District Council,* 129 F. Supp. 417 (D.D.C. 1955), and such an agreement in fact existed in the form of the unsigned collective bargaining agreement which was attached to the unsigned trust agreement governing the Fund. According to appellant, Elmhurst's conduct and action in observing the terms of the collective bargaining agreement attached to the trust agreement by paying uniform union scale wages and by making contributions to the trust fund were tantamount to ratification and adoption of a written agreement by Elmhurst even though it had not signed it. We do not agree with appellant's analysis.

In the first place, the *Dunbar* case involved a situation where employers were disputing their obligation to contribute to a union trust fund in the absence of a signed, written trust agreement. The district court in *Dunbar* found *as a fact* that, at one time previously, there had been in existence a valid, formal, written trust agreement, and that the original signed copy of this agreement had disappeared and only an unsigned copy remained. The question before the court in *Dunbar* was whether the employers could be compelled to contribute to the trust fund on the basis of the duplicate written agreement bearing no signatures. On these facts the district court held that sub-

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ing any payments by Elmhurst or its successor to Local 282-Pension Trust Fund or its predecessors, or specifying the detailed basis upon which such payments should be made.

Both appellant and appellees then again moved for summary judgment, and thereupon Judge Ryan denied appellant's motion and granted appellee's motion on the merits, accompanying his denial order with the exhaustive opinion reported at 267 F. Supp. 641 (1967).

section 302(c)(5)(B) only required a written and not a signed agreement. *Dunbar* is clearly factually distinguishable from the instant case.

In the second place, ratification and adoption are only forms of acceptance of a contract and must conform to the general principles governing the formation of contracts. Two essential elements of a contract formation are mutuality of agreement and mutuality of obligation. See, generally, 17 C. J. S. Contracts, § 1(1) (1962). Both of these elements are missing in this case. The union demanded the acceptance of a complete collective bargaining agreement along with the trust agreement.[6] Elmhurst did not appear to be willing to accept these terms at any time. In such a situation it would be ridiculous to assert that there was agreement between the parties and a mutuality of obligation. Therefore, on the record as made, we hold that there was no ratification, or any adoption of, the collective bargaining agreement by Elmhurst.

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[6] It is true that the Local would allow employers to participate in the Fund *before* a collective bargaining agreement had been executed between the Local and the employer if the employer would agree to adhere to the terms of the trust agreement. Article I, § 1, of the trust agreement defined an employer who may contribute to the fund as an

> . . . employer who has duly executed a collective bargaining agreement with the Union and who is a signatory to this agreement, and also any employer not presently a party to such collective bargaining agreement who hereafter executes such agreement provided that such employer satisfies the requirements for participation as established by the Trustees and agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust, and becomes a party hereto.

But it is clear that this exception was not intended to be a permanent exception. As we read the trust provision, the Local is only willing to allow employers who agree to the trust and are in the process of negotiating or executing a complete collective bargaining agreement with the Local to participate in the Fund during the interval before the collective bargaining agreement is formally signed. It does not permit an employer to participate without ever signing an agreement.

Appendix C

Appellant has raised a number of questions relating to the possible abuse of discretion on the part of the trustees in so construing the trust agreement as to prevent them from paying benefits to the appellant. As we are holding that it would be illegal for the trustees to retain the contributions of Elmhurst or to pay benefits to appellant, it is not necessary to discuss these contentions for they relate only to the proper interpretation of the trust agreement or to the power of the Trustees under the agreement to deny pension benefits to the appellant.

We realize that other claimants to union welfare funds and perhaps even other claimants to this very pension trust may find themselves in the position of appellant.[7] Nevertheless, the proper remedy for such a regrettable situation is not the enforcement of a claimant's rights under the trust because that would allow evasion of a carefully drafted

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[7] In their Answer to appellant's complaint, the Trustees stated that:

> The issues raised in this action may be expected to arise in future situations involving applications for benefits under the Pension Plan of Local 282-Pension Trust Fund . . .

The Trustees of this Trust Fund have made a practice of accepting employer contributions without checking the Local records to ascertain whether or not the contributing employer has a written agreement with the Local detailing the basis upon which employer payments are to be made into the Fund. Instead of checking records when the contributions are received, as Section 302 requires, the Trustees have waited until an application for a pension is made by an employee of a contributing employer and then have checked to see if the employer's contributions and the Trustees' acceptance of the contributions conformed with both the Section 302 requirements and the provisions of the trust agreement. If the contributions and acceptance of the contributions were in violation of Section 302 or the trust agreement or both, then the innocent employee's pension request is denied. This practice has caused needless hardship in this case and could cause hardship in other cases involving innocent employees. Those engaged in the future in such lackadaisical adherence to the mandates of Section 302 should bear in mind that Congress has provided appropriate penalties for those who take too lightly the requirements of that section.

statute. The congressional scheme, if properly enforced by government attorneys, is designed to prevent this unfortunate situation from ever arising. *Employing Plasterers' Association of Chicago* v. *Journeymen Plasterers' Protective and Benevolent Society of Chicago, Local No. 5*, 279 F. 2d 92, 97-98 (7 Cir. 1960). If the sanctions provided by Section 302(d) had ever been invoked here, neither the Trustees of this particular fund nor the trustees of any other similarly situated fund would ever permit the state of affairs to reach this deplorable condition.[8]

Affirmed.

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[8] At 267 F. Supp. 641, 643, 648, the district judge appears to indicate by dicta that a present execution by the employer of the collective bargaining and trust agreements could validate the 36 months of pension payments appellant claims were payable to her month by month from May 1, 1965 to April 1, 1968, and could legalize the abortive payments by Elmhurst to the Fund. Though we approach the resolution of the dispute between the parties by the same route taken by the district judge we point out that we are not adopting this dicta.